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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1940.

314-644

No. 232

CHARLES M. KOEBERLEIN,

Petitioner,

vs.

GEORGE W. DURBIN AND MINNIE L. DURBIN, THE CARTER OIL COMPANY, MABEL DURBIN AND HARVEY H. DURBIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Petitioner, Charles M. Koeberlein, of St. Elmo, Illinois, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the title to lands in Fayette County, Illinois. The only controversy is between the petitioner, Charles M. Koeberlein, and George W. Durbin and Minnie L. Durbin, his wife, hereinafter referred to as "respondents." Mabel Durbin and Harvey H. Durbin are only nominal parties to the proceedings, and claim no interest in said lands. The Carter Oil Company is the assignee of an oil and gas lease on said lands, and its rights are not

sought to be affected, a stipulation having heretofore been entered into between it and petitioner, recognizing the validity of said oil and gas lease.

On January 15, 1930, respondents were the owners of two tracts of land, aggregating 107½ acres. On that day they executed a mortgage on said lands to Mabel Durbin, a sister-in-law of George W. Durbin, to secure their note for $1700.00, due 10 years after date, and bearing interest at the rate of 6% per annum, payable annually. (R. 210.)

On March 11, 1937, Mabel Durbin instituted proceedings to foreclose her mortgage, in the Circuit Court of Fayette County. Respondents were the only parties made defendants to said proceedings. They were served with summons, but filed no answer or other pleadings, and were defaulted. (R. 211.)

On May 15, 1937, a decree of strict foreclosure was entered in said proceedings, finding that there was due from the respondents to Mabel Durbin the sum of $2150.84, together with $100.00 attorney's fee. Said decree also found that respondents are wholly insolvent, and are unable to redeem said premises; that the mortgaged premises are meagre and scant security for the amount found to be due, and that the value of said premises is wholly insufficient to pay such amount, and that no benefit can inure to respondents by a sale of the mortgaged premises. (R. 212.) It directed payment of the indebtedness within three months, and in default thereof, respondents, and each of them, were to be forever barred and foreclosed from all equity of redemption and claim of, in and to said mortgaged premises. (R. 213.)

By quitclaim deed dated July 26, 1937, and recorded on July 29, 1937, Mabel Durbin and Harvey H. Durbin, her husband, conveyed all their interest in the lands to petitioner. (R. 222.)

By quitclaim deed dated July 26, 1937, and recorded on

June 18, 1938, respondents conveyed all their interest in the lands to petitioner (R. 225), and also, under date of July 28, 1937, executed a so-called "waiver of right of redemption," which instrument provided that in consideration of $50.00, respondent waived all right to redeem the lands in question. (R. 229.)

Pleadings of Respondents and Petitioner in the Litigation Here Involved.

On November 7, 1938, The Carter Oil Company filed its complaint in chancery, in the Circuit Court of Fayette County, Illinois, to redeem from the strict foreclosure, for the purpose of protecting its interest under its oil and gas lease on the property foreclosed. (R. 2.)

Respondents filed an answer and counterclaim in said proceedings. In the counterclaim, as well as in their amended answer, they alleged that they were the owners of the lands in question. They admitted the execution and delivery of the quitclaim deed to petitioner, but alleged:

1. That said deed was given pursuant to a verbal agreement with petitioner, under which petitioner was to pay to Mabel Durbin the amount due her under the foreclosure decree, and that respondents were to have two years from the date of said quitclaim deed within which to pay petitioner the amount so advanced by him, and that upon such payment, petitioner was to convey the property to respondents; that said quitclaim deed was intended to be only a mortgage to secure the amount advanced by petitioner (R. 59); that they had tendered to petitioner the amount required, which tender was refused. (R. 60.)

2. That the quitclaim deed from respondents to petitioner was not acknowledged, and therefore did not convey the homestead estate of respondents; that since the value of the lands involved did not exceed

$1000.00, no estate in said property whatsoever was conveyed to petitioner by said quitclaim deed. (R. 61-62.)*

The prayer of the counterclaim was, *first*, that the court decree that the deed from respondents to petitioner was in fact and effect but a mortgage to secure the amount advanced by petitioner for respondents; *second*, that the court decree that an agreement was in fact made between petitioner and respondents, for the reconveyance of the property, if respondents repaid to petitioner the amount so advanced, and that respondents, having complied with said agreement, are entitled to specific performance of said agreement, and *third*, that because no valid acknowledgment was made to the quitclaim deed, and because the value of the property conveyed did not exceed $1000.00, no estate whatsoever was conveyed by said deed to petitioner. (R. 62.)

Petitioner's reply to respondents' amended answer, and to their counterclaim, joined issue on the allegations thereof. Petitioner denied that the deed to him was intended as a mortgage, and asserted that said deed was, and was intended to be, an outright conveyance of the property involved; denied that any agreement was made between petitioner and respondents, under which petitioner was to advance to Mabel Durbin the amount due her under the foreclosure decree, and that respondents were to have the right to pay him the amount so paid to Mabel Durbin for her interest in the property, and receive a conveyance from petitioner; denied that the property was the homestead of respondents, and asserted that respondents had waived,

* Section 1 of Chapter 52, Illinois Revised Statutes, 1939, grants to every householder having a family an estate of homestead to the extent, in value, of $1,000.00, in the land and buildings thereon occupied as a residence. Section 4 of said Chapter provides that no conveyance of such homestead estate is valid unless subscribed by such householder, and his or her wife or husband, and acknowledged in the manner required for conveyance of real estate, or possession is abandoned or given pursuant to the conveyance.

released and abandoned their homestead estate in the property. (R. 68-69.)

The foregoing constitute the only issues made by the pleadings relative to the controversy between petitioner and respondents.

The case was tried before the Court. The testimony of petitioner and respondents was directed to the issues made by the pleadings. There was sharp conflict between the parties on the question of fact as to the making of the alleged agreement. The Chancellor found the issues in favor of petitioner, holding that the quitclaim deed was not given as security, but was an outright conveyance of all right and interest of the respondents in the property to petitioner; that respondents had no right of homestead in the property, and decreed that the counterclaim of respondents be dismissed for want of equity. (R. 90, 93.)

Petitioner appealed to the Supreme Court of Illinois on the issue of the validity of The Carter Oil Company lease (not here involved). Respondents filed a cross-appeal.

The brief and arguments of the parties in the Supreme Court of Illinois dealt solely with a review of the trial court's decision on the issues made by the pleadings and litigated by the parties. Respondents relied upon two propositions for reversal of the trial court's decree as to them—*first*, that the deed to petitioner was intended to be and was a mortgage, and *second*, that there was no valid conveyance, release or abandonment of the homestead estate. (R. 304.)

Opinion of the Supreme Court of Illinois.

On February 14, 1941, the Supreme Court of Illinois reversed that portion of the decree of the trial court which dismissed the counterclaim of respondents for want of equity, and remanded said cause to the Circuit Court of

Fayette County, with directions to enter a decree in favor of respondents in accordance with the views expressed in the Court's opinion. (R. 349.)

The opinion of the Court appears at pages 334 to 348 of the Record. In that opinion, the Court, after commenting on the contentions between the parties and the evidence in the record, holds that at the time of the conveyance from respondents to petitioner, a mortgagor-mortgagee relationship existed between the parties; that

> "This relationship is one about which the law is very strict, not only in Illinois, but everywhere. While it is not legally impossible for a mortgagee to acquire the mortgagor's equity of redemption, yet such a transfer or agreement to transfer is one that is jealously regarded by a court of equity and which will be strictly scrutinized for evidence of oppression, fraud or unfairness." (R. 345.)

The Court holds that to give validity to a conveyance of the equity of redemption from the mortgagor to the mortgagee, it must be shown that the conduct of the mortgagee was fair and frank, that he paid for the property what it was worth, that he exercised no undue influence, and took no advantage of the fears or poverty of the mortgagor.

The Court then proceeds to dispose of the controversy in the following language:

> "When this rule of law is applied to the transaction we are considering, only one result is possible. It is said that the mortgagee must not take undue advantage of the fears or poverty of a mortgagor and yet he did so in this case. The mortgagors were subject to a decree of strict foreclosure—the harshest remedy known to a court of equity; the mortgagors were indebted to the mortgagee on other indebtedness, in part represented by a chattel mortgage on the grain binder at harvest time with the crop ready to harvest; the mortgagors were said to be insolvent and were faced

with the imminent loss of their homestead. The rule requires that the mortgagee must show that he has been fair and frank and that he has paid for the property what it was worth. As to fairness and frankness Koeberlein did not even testify that he had told George and Minnie Durbin that he had been to Vandalia and settled with Mabel's attorney. The evidence affirmatively discloses that he paid absolutely nothing for the deed, merely promising to pay that for which he was already bound—*i. e.*, some notes on which he was surety and which, by the insolvency of the makers, he would have had to make good. The evidence also shows that no matter what the parties may have thought about the value of the land it was proved within less than the normal period of redemption to be worth a quarter of a million dollars. The rule is that any indirection or obliquity of conduct will be fatal to any title which the mortgagee acquires thereby, and yet such obliquities are numerous in this case. He falsely and fraudulently procured from the Durbins a power of attorney to sign their names to any papers necessary to settle with Mabel Durbin when he had already settled and knew that no such papers had to be signed on the deal he had made and would not be required for signature unless it might be upon some agreement extending the period of redemption. Under the most favorable interpretation to him he made himself their agent and liable to account. Under the only other possible interpretation he tricked and defrauded them. Other badges of fraud are apparent. Thus, we must notice the clandestine nature of the visit to the Durbin home without a notary public or disinterested witnesses, the procuring of fictitious acknowledgments and his failure to record the deed until demand for redemption. We must also note his obvious lack of frankness and honesty when he tried to deny his letter to Mabel's attorney, written by himself. A careful examination of his entire testimony which would unduly prolong this opinion would disclose other frailties. It is enough to say that he has not sustained the burden of showing that degree of fairness which the law requires of one who attempts

to secure this mortgagor's equity of redemption for himself." (R. 346.)

It is petitioner's contention that the Supreme Court of Illinois decided the cause on a proposition of fact and a theory wholly foreign to and in complete disregard of the issues made by the pleadings and litigated by the parties in the trial court, or the questions raised by the parties on the appeal, and thereby petitioner has been deprived of an opportunity to be heard on the issues and theory upon which final judgment has been rendered against him.

Jurisdiction.

1. The reversal by the Supreme Court of Illinois of the decree of the trial court in favor of petitioner, and the entry by that Court, of final judgment against petitioner, based upon a proposition of fact and theory not pleaded by respondents or litigated by the parties in the trial court, or raised on appeal, constitutes a denial of due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

2. The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois, where the question sought to be reviewed is whether a violation of the rights guaranteed by the Federal Constitution has occurred, is expressly provided for by Judicial Code, Sec. 237, as amended by the Act of February 13, 1925.

3. The opinion of the Supreme Court of Illinois was filed, and its judgment entered, on February 14, 1941. (R. 334-348.) Petition for rehearing was filed March 10, 1941, and denied April 8, 1941.

4. In his petition for rehearing (R. 351-366), petitioner directed the attention of Supreme Court of Illinois to the fact that he had been deprived of an opportunity to be heard on the facts and the law as found and applied by that Court.

We refer to the following excerpts from said petition for rehearing:

> "Nowhere in the pleadings or at the trial or in the brief filed by the Durbins here was any contention made that Koeberlein was under any special duty toward the Durbins, or that he defrauded or overreached them.
>
> We respectfully submit that this Honorable Court has overlooked the pleadings of the parties and the issues litigated by them at the trial, and that it has considered and decided the case on a theory not presented below. The theory of the decision here is that when the Durbins made their deed to Koeberlein the relation of mortgagor and mortgagee existed between the parties, and that Koeberlein has not sustained the burden of showing that degree of fairness which the law requires of a mortgagee who attempts to purchase a mortgagor's equity of redemption.
>
> Since this theory of overreaching was not advanced by the Durbins at any stage of this case, Koeberlein has had no opportunity to be heard as to the application of the theory to this case, either on the facts or the law, and so we must ask the Court to bear with us in analyzing the facts in the record and applying the law to these facts, though this petition is somewhat longer than would otherwise be necessary." (R. 352-353.)

and

> "No allegation of fraud or overreaching appears in the pleadings of the Durbins. No such contention was advanced by the Durbins during the trial below or in their brief filed in this Court. The only question in controversy between the Durbins and Koeberlein is: Was there an agreement between the parties as claimed by the Durbins?
>
> We submit in all sincerity that it is unjust for a court of review to condemn a litigant and brand him a crook for alleged improper conduct and misdealings which were not alleged or otherwise made an issue by his adversaries on the trial." (R. 360-361.)

The petition for rehearing was denied, without further opinion. (R. 366.)

The Question Presented.

The sole question presented is whether the Supreme Court of Illinois violated the due process clause of the Fourteenth Amendment to the Federal Constitution, by reversing the decree of the trial court and rendering final judgment against petitioner, who had been successful in the trial court, upon a proposition of fact and a theory which had not been presented in the pleadings of the respondents or litigated at the trial, nor raised in the briefs of the parties filed in the Supreme Court.

Reasons Relied Upon for the Allowance of the Writ.

1. Respondents, in their counterclaim, alleged the existence of an agreement between them and petitioner, under which respondents allegedly had a right to redeem. Aside from the question of homestead, which was not passed upon by the Supreme Court of Illinois, and is not involved here, this was the only contention which, under the pleadings and at the trial, petitioner was required to meet. He did meet this issue successfully. The Supreme Court, in reversing the decree in his favor, wholly ignored the issue thus made by the pleadings, and litigated by the parties, and set aside the conveyance from the respondents to the petitioner, on the ground of fraud, oppression and unfair dealing. Petitioner has never had an opportunity to meet these issues. The most elementary principle of justice requires that he be given the opportunity to defend, before being condemned on these grounds and having his property taken away from him.

2. The opinion of the Supreme Court of Illinois brands petitioner a crook and perjurer, and as devoid of morals and ethics. His reputation as a merchant and banker of

many years' standing in his community is seriously impugned. Yet his conduct in connection with the transaction involved was not even questioned by the respondents. If the decision of the Supreme Court of Illinois is to stand, petitioner loses not only the lands involved, but also his reputation and good name, without ever having had the opportunity to meet the charges of which the court has convicted him.

A certified copy of the record in said suit in the Supreme Court of Illinois, including the abstract of record, proceedings, opinion and disposition of the cause had in said Court, is herewith furnished and lodged in the office of the Clerk of this Court, in compliance with Rule 38 of the rules of this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of this Court, directed to the Supreme Court of Illinois, commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all the proceedings had in the case numbered and entitled on its docket as No. 25765, The Carter Oil Company, a corporation, Plaintiff-Appellee, *vs.* Mabel Durbin, Harvey H. Durbin, George W. Durbin and Minnie L. Durbin, Defendants-Appellees, and Charles M. Koeberlein, Defendant-Appellant and Cross-Appellee, George W. Durbin and Minnie L. Durbin, Appellants on Cross Appeal, and that said opinion and judgment of the Supreme Court of Illinois may be reversed by this Court, with directions that this cause be remanded to the Circuit Court of Fayette County for further proceedings, in which, if the respondents desire, their pleadings may be amended to encompass the issues of fraud, unfair dealing and overreaching, and additional evidence may be taken, and petitioner may have

full opportunity to present his defense, and that petitioner have such other and further relief in the premises as to this Court may seem meet and just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The parties to a cause, on appeal, are limited to the contentions made in their pleadings or raised on the trial of the cause, and courts of appeal are likewise limited to the consideration of the same questions.

Helvering v. *Tex-Penn Co.*, 300 U. S. 481, 498.

Hormel v. *Helvering*, 61 S. Ct. Rep. 719, 721.

Nelson v. *Colegrove*, 354 Ill. 408, 414.

Wollenberger v. *Hoover*, 346 Ill. 511, 538.

Finefrock v. *Kenova Mine Car Co.*, 22 Fed. (2d) 627, 634 (4th C. C. A.).

Roof v. *Rule*, 348 Ill. 370, 375.

Fisher v. *Burks*, 274 Ill. 363, 367.

Butler v. *Miller*, 208 Ill. 231, 235.

II.

The Supreme Court of Illinois based its decision entirely upon a proposition of fact and a theory not presented in the pleadings of any of the parties, or raised or litigated at the trial, or presented or argued in the briefs of the parties filed in the Supreme Court.

See Argument.

III.

The Supreme Court of Illinois, by reversing the decree of the trial court and rendering final judgment against petitioner, based upon a proposition of fact and a theory which had not been presented in the pleadings of the parties or at the trial, nor in the briefs filed in the Supreme Court, violated the due process clause of the Fourteenth Amendment to the Federal Constitution.

Saunders v. *Shaw*, 244 U. S. 317, 319.
Helis v. *Ward*, 308 U. S. 365, 370.
Castle v. *Persons*, 117 Fed. 835, 843 (8th C. C. A.).
Union Cemetery Association v. *Kansas City*, 252 Mo. 466, 161 S. W. 261, 274.

ARGUMENT.

I.

The Parties to a Cause, on Appeal, Are Limited to the Contentions Made in Their Pleadings or Raised on the Trial of the Cause, and Courts of Appeal Are Likewise Limited to Consideration of the Same Questions.

There are few doctrines so universally established as the fundamental rule that courts of review will only consider and render decisions upon the contentions of the parties made at the trial of the cause, within the scope of their pleadings, and will not consider questions, either of fact or law, which were not presented to the trial court.

The reason for this rule is well stated by this Court in the case of *Hormel* v. *Helvering,* 61 S. Ct. Rep. 719, at page 721:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding."

Under the exceptional circumstances of the Hormel case, this Court ruled that the Circuit Court of Appeals properly gave consideration to Section 22a of the Revenue Act, in determining the taxpayer's liability, although said Section was not relied on before the Board of Tax Appeals. However, it is to be noted that this Court remanded the case to the Board of Tax Appeals in order to give the taxpayer an opportunity to offer evidence on the new issue raised, the Court saying, at page 723:

> "But the Board of Tax Appeals neither found the facts nor considered the applicability of 22a in the light of the Clifford case. Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue, however remote may be his chance to take his case out of the Clifford rule."

In *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, this Court refused to consider a contention made by the Commissioner of Internal Revenue, because such contention was not made or relied upon in the courts below. This Court said, at page 498:

> "The parties presented their respective claims to the board and to the lower court on the theory that, if neither Tex-Penn nor its stockholders as such received any cash from Transcontinental, the transaction would be within Sec. 202(b). The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies. His failure earlier to present the question leaves this court without the assistance of decision below. His petitions for these writs did not present

> the question to this court. We are not called on to consider the construction of Sec. 202(b) now proposed."

The appellate jurisdiction of the Supreme Court of Illinois is subject to this identical limitation.

Thus, in *Nelson* v. *Colegrove*, 354 Ill. 408, it was sought to establish a trust as to certain bonds. On appeal, with respect to a contention that the bonds were obtained by fraud and misrepresentation, the court, at page 414, says:

> "The contention that the bonds were obtained from the plaintiff in error by fraud and misrepresentation cannot be sustained. The petition contains no such allegation. In the absence of a charge of fraud and misrepresentation in the petition, there was no basis for evidence to that effect. The circuit court did not consider the question; the Appellate Court found that no such issue was raised and the question is not presented to this court."

Again in *Wollenberger* v. *Hoover*, 346 Ill. 511, the Supreme Court of Illinois refused to consider a new contention sought to be made by complainant, saying, at page 538:

> "Inasmuch as he has by his bill of complaint and by his own evidence made his claim in the lower court and confined it to the relief aforesaid, he cannot be allowed in this court to make other and different claims than he made in the lower court. It is elementary that a complainant in a chancery suit cannot make one case by his bill in the lower court and on a review by a reviewing court be allowed to make another and entirely different one. This court has frequently so declared, and we have also expressly declared that 'this court reviews a case presented to the trial court and does not sit to try issues presented for the first time in this court.' " (Citing cases.)

As will be demonstrated under point II hereof, the Supreme Court of Illinois, contrary to its own long estab-

lished rule relating to the scope of review on appeal, of its own volition considered and decided the litigation here involved upon an issue not pleaded nor litigated on the trial, nor raised on the appeal to that Court.

II.

The Supreme Court of Illinois Based Its Decision Entirely Upon a Proposition of Fact and a Theory Not Presented in the Pleadings of Any of the Parties, or Raised or Litigated at the Trial, or Presented or Argued in the Briefs of the Parties Filed in the Supreme Court.

The pleadings of respondents consist of an amended answer and counterclaim, which will be found at pages 54 to 62 of the Record, and are outlined in the petition for certiorari.

To summarize very briefly, the only contentions made by respondents in their pleadings are:

> *First*, that an agreement was made between respondents and petitioner, that respondents were to have two years to repay petitioner the amount petitioner had paid to Mabel Durbin under the foreclosure decree, and upon such payment respondents were to receive a conveyance of the property from petitioner; that the conveyance from respondents to petitioner was intended to be a mortgage. (R. 59.)
>
> *Second*, that the deed from respondents to petitioner, not having been properly acknowledged, and the property being respondents' homestead and having a value of less than $1,000.00, no estate whatsoever passed by said deed to petitioner. (R. 61.)

Petitioner's reply to the amended answer and his answer to the counterclaim joined issue on these contentions.

On appeal, respondents urged the same contentions made in their pleadings. Thus, as stated in their brief:

> "Defendants George W. Durbin and Minnie L. Dur-

bin (respondents) rely upon two propositions for a reversal of the decree as to them:

First: That the deed to petitioner was intended to be, and was, a mortgage.

Second: That there was no valid conveyance, release or abandonment of the homestead estate of sixty-seven acres." (R. 304.)

With respect to the first proposition, respondents state in their brief:

> "It must be admitted that the testimony is very conflicting upon the point, that is, 'Was there an agreement and understanding among petitioner and respondents that the deed was only security for the payment to Mabel Durbin by petitioner the amount due on the mortgage?' " (R. 304.)

And again:

> "And while it is true that respondents have the burden of proving that the deed they made to petitioner is but a mortgage, and was so intended by the parties, that does not mean that there shall be absence of conflict in the testimony." (R. 308.)

Such were the pleadings of respondents, and their contentions on appeal to the Supreme Court of Illinois.

A careful reading of the opinion of the Supreme Court of Illinois, appearing at pages 334 to 348 of the Record, will suffice to show that said Court decided the case upon a proposition of fact and theory not raised in the pleadings, or urged or relied upon on appeal to that Court, namely, that petitioner was guilty of fraud, unfairness and overreaching in the transaction whereby he received the conveyance of the property in question from respondents.

Said Court holds that at the time of the conveyance to petitioner, the relationship between respondents and petitioner was that of mortgagor and mortgagee; that "while it is not legally impossible for a mortgagee to acquire the mortgagor's equity of redemption, yet such a transfer

or agreement to transfer is one that is jealously regarded by a court of equity and which will be strictly scrutinized for evidence of oppression, fraud or unfairness." (R. 345.) The Court then quotes from the case of *Alexander* v. *Rodriguez*, 12 Wall. 323, as follows:

> "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que* trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee, was, in all things, fair and frank and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals and the protection due to those whose property is thus involved, require that such should be the law." (R. 345-346.)

The Court then states: "When this rule of law is applied to the transaction we are considering, only one result is possible." (R. 346.) The Court proceeds to review petitioner's conduct in connection with the transaction, and finds that he did not pay an adequate consideration for the property, and that he was guilty of fraud, unfairness and overreaching. (R. 346.) In concluding its review of petitioner's conduct, the Court says: "A careful exam-

ination of his (petitioner's) entire testimony which would unduly prolong this opinion would disclose other frailties. It is enough to say that he has not sustained the burden of showing that degree of fairness which the law requires of one who attempts to secure this mortgagor's equity of redemption for himself." (R. 347.)

It is respectfully submitted that the foregoing summary and quotations from the Court's opinion leave no doubt that the basis of said Court's decision was the fraud, unfairness and overreaching found by the said Court with respect to petitioner. A reading of the entire opinion will serve to emphasize this conclusion.

Since the issue of fraud and unfair dealing was not raised or relied upon by respondents at any time in the proceedings, it is natural that the Supreme Court found no assistance in respondent's brief and argument, in arriving at its decision in favor of respondents. Indeed, the position respondents took, in several instances, was in direct contradiction to the view taken by the Court. Thus, as shown above, respondents conceded in their brief that the rule of law applicable to the case placed upon them the burden of proof to establish that the deed they delivered to petitioner was intended as a mortgage. (R. 304.) However, in the view taken by the Supreme Court, the burden of proof was shifted to petitioner, the Court stating in its opinion: "It is enough to say that he (petitioner) has not sustained the burden of showing that degree of fairness which the law requires of one who attempts to secure this mortgagor's equity of redemption for himself." (R. 347.)

Again, on the question of the adequacy of the consideration paid by petitioner for the property, the Court holds that "the rule requires that the mortgagee show that he has paid for the property what it was worth." (R. 346.) One of the two contentions urged by respondents in their

pleadings, and at the trial, and on appeal, was that the value did not exceed $1,000. (See counterclaim, R. 61.) Respondents' counterclaim further discloses that petitioner paid for the property more than twice the amount claimed by respondents to be the value thereof. (R. 60.) The Supreme Court of Illinois, in its effort to avoid the implications of the contention as to the value of the property made by respondents, is forced into making an unfortunate statement, which is clearly contrary to law. The Court says: "The evidence also shows that no matter what the parties may have thought about the value of the land it was proved within less than the normal period of redemption to be worth a quarter of a million dollars." (R. 346-347.) The Court refers to petitioners' testimony as to the value of the lands as of March 30, 1939. (R. 156.) The Supreme Court was thus forced, in determining whether petitioner paid an adequate consideration for the property at the time he received the conveyance, to consider evidence of the value of the property as of a date approximately 20 months subsequent to the time of the conveyance.

Further substantiation of the view that the Court, in deciding the case, entirely ignored the contentions of the parties, is found in the fact that the Court's opinion does not cite or refer to a single case cited by either party in the briefs filed in the Supreme Court of Illinois, as authority for their respective positions.

In short, under pleadings, evidence and decision below, and assignments of error, briefs and arguments on appeal, the sole primary issue was whether there was an enforceable oral agreement that the deed, though admittedly entirely valid, should operate as a mortgage, with a right of redemption in grantors, the burden of proving the oral agreement, by their own admission, resting on grantors. The reviewing court, without aid from record below or as-

signments of error, briefs or arguments on appeal, determined that the grantee was guilty of fraud, oppression and unfair dealing, making the deed to him invalid from the beginning, and putting on the grantee the burden of proving not only that there was no oral agreement, but also that the execution and delivery themselves were free from fraud.

III.

The Supreme Court of Illinois, by Reversing the Decree of the Trial Court and Rendering Final Judgment Against Petitioner, Based Upon a Proposition of Fact and a Theory Which Had Not Been Presented in the Pleadings of the Parties or at the Trial, Nor in the Briefs Filed in the Supreme Court, Violated the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

It must be borne in mind that on the issues made by the parties, and litigated in the trial of this case, the trial court found for petitioner. In Illinois great weight is given to the chancellor's findings.

A typical expression of the view of the Illinois Supreme Court in that respect is found in the case of *Hall* v. *Pittinger*, 365 Ill. 135, where the Court says, at page 135:

> "The chancellor who tried the case received the evidence in open court, saw the witnesses and heard them testify. Under these circumstances we will not disturb the findings of the chancellor unless manifestly and palpably wrong; and this is true even though we might be inclined to find otherwise had we been placed in his stead upon the trial of the suit."

In deciding the case upon issues not raised or litigated by the parties, obviously the Supreme Court of Illinois could not have had, and did not have the benefit of the views of the chancellor as to such issues. Where the issue upon which the case is decided is that of fraud of one

of the litigants, it would seem especially important for a court of review to have the benefit of the trial court's views before it on the appeal of the case, and the absence of such findings on that issue by the chancellor, who is in the best possible position to evaluate the testimony of witnesses, becomes very significant and serious.

Basically, the reason for the rule announced by the cases cited under point I, relating to scope of review by appellate courts is founded upon the due process clause of the Fourteenth Amendment. It is axiomatic that due process requires notice and an opportunity to be heard. In this case petitioner has been deprived of an opportunity to be heard on the issue upon which the Supreme Court of Illinois decided the case against him.

There are, as might be expected, relatively few authorities involving civil cases, in which the claim is made that due process was denied by action of courts of review. This Court, however, has recognized and enforced the principle contended for by petitioner, on several occasions.

Thus, in the case of *Helis* v. *Ward*, 308 U. S. 365, this Court granted certiorari on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record, and on a theory which had never been tried by the litigants. The Court's statement to this effect is found on page 370.

In case of *Saunders* v. *Shaw*, 244 U. S. 318, plaintiff in error contended that his rights under the due process clause of the Federal Constitution had been violated by the decision of the Supreme Court of Louisiana. It appeared that on the trial of said case, which was a suit to enjoin the collection of a drainage tax, evidence with respect to the physical condition of the property sought to be taxed was ruled by the trial court to be immaterial. Judgment was entered in the trial court for defendants. On appeal to the Supreme Court of Louisiana the judgment was first affirmed.

However, on rehearing, the judgment was reversed, the court holding that the land involved was low and marshy, and had not been benefited or drained, and could not be, under existing conditions. Final judgment was entered in the Supreme Court of Louisiana, enjoining the assessment against the land.

Plaintiff in error, an intervenor in the case, who held some of the drainage district bonds, sought a review of the judgment of the Supreme Court of Louisiana. In reversing the decision and judgment of the Supreme Court of Louisiana, this Court, through Justice Holmes, states the question involved, and the decision of the court thereon, as follows, at page 319:

> "He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

It is submitted that this case is direct authority for petitioner's contention here.

In *Castle* v. *Persons,* 117 Fed. 835, Judge Sanborn, of the Circuit Court of Appeals for the Eighth Circuit, in his concurring opinion of reversal of the District Court's opinion, very forcibly and aptly states the rule applicable to the case at bar. At page 843, he says:

> "That due process of law without which parties may not be deprived of their property gives to them an opportunity to be heard respecting the justice of the judgment sought. It gives notice of the issue to be determined before it is tried. One may not bring suit upon one cause of action and recover upon another, nor may he go to trial upon one defense and sustain a judgment in his favor upon another and inconsistent defense. He may not deny in his answer the plaintiff's averments of a good cause of action, and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter no notice of which was given by the pleadings or by the course of the trial until the plaintiff had introduced substantially all his evidence. Proofs without averments and averments without proofs are equally unavailing." (citing cases.)

In the case of *Union Cemetery Association* v. *Kansas City,* 252 Mo. 466, 161 S. W. 261, the Supreme Court of Missouri, in refusing to consider a question not presented to the trial court, in its opinion, at page 274, says:

> "In answer to that request, we will state that, while there seems to be much merit in this request, as incidentally appears from this record, yet no such question was presented by the pleading or established by the evidence or considered by the trial court, and for that reason, however desirous we might be to afford the relief thus prayed, yet it is perfectly apparent that, under the present condition of the pleadings (and evidence) in the case, we have no jurisdiction to so do. Such a holding would clearly deprive the cemetery company of its property without due process of law, within the meaning of both the state and federal Constitutions."

Petitioner asks this Court to reverse the judgment and decision of the Supreme Court of Illinois, with directions to remand this cause to the Circuit Court of Fayette County. There respondents, if they desire, may reframe their pleadings to encompass the issue of fraud, which the Supreme Court of Illinois apparently felt should have been the issue in the case. Petitioner will then have an opportunity of meeting such issue, if raised. A denial of that opportunity is a denial of due process.

In the case of *Finefrock* v. *Kenova Mine Car Co.*, 22 Fed. (2d) 627, cited under point I, the Circuit Court of Appeals for the Fourth Circuit, after refusing to consider a new issue, attempted to be raised in that court, said, at page 634:

> "We think that the proper action on this branch of the case is to remand it without final decision to the District Court for further proceedings, in which, if the parties desire it, the pleadings may be amended, additional evidence may be taken, and the defendants may have full opportunity to present their defense. There is abundant authority for the proposition that the appellate court has power, without determining and disposing of a case, to remand it to the lower court for further proceedings, if the case has been tried on a wrong theory, or the record is not in condition for the appellate court to decide the questions presented, with justice to all the parties concerned." (citing cases.)

The relief we are asking was granted by this Court in *Saunders* v. *Shaw* and *Hormel* v. *Helvering*, cited above. It was also granted by the Circuit Court of Appeals for the Fourth Circuit in *Finefrock* v. *Kenova Mine Car Co.*, and for the Eighth Circuit in *Castle* v. *Persons*, both cited above. It should be noted that it is apparent from the opinions of this Court, in both the *Hormel* and *Saunders* cases, that this Court felt that the litigant who complained of a violation of his constitutional rights had very little chance of ultimate success in the litigation, yet this Court felt impelled to permit the litigant an opportunity to be heard.

In the instant case petitioner is confident that he will be able to successfully meet the issues of fraud, unfairness and overreaching, if such issues are raised by respondents in subsequent proceedings. All petitioner seeks is to be given an opportunity to do so.

Respectfully submitted,

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Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1941.

CHARLES M. KOEBERLEIN,
Petitioner,

vs.

GEORGE W. DURBIN and MINNIE L. DURBIN; THE CARTER OIL COMPANY; MABEL DURBIN and HARVEY H. DURBIN,
Respondents.

No. 232.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

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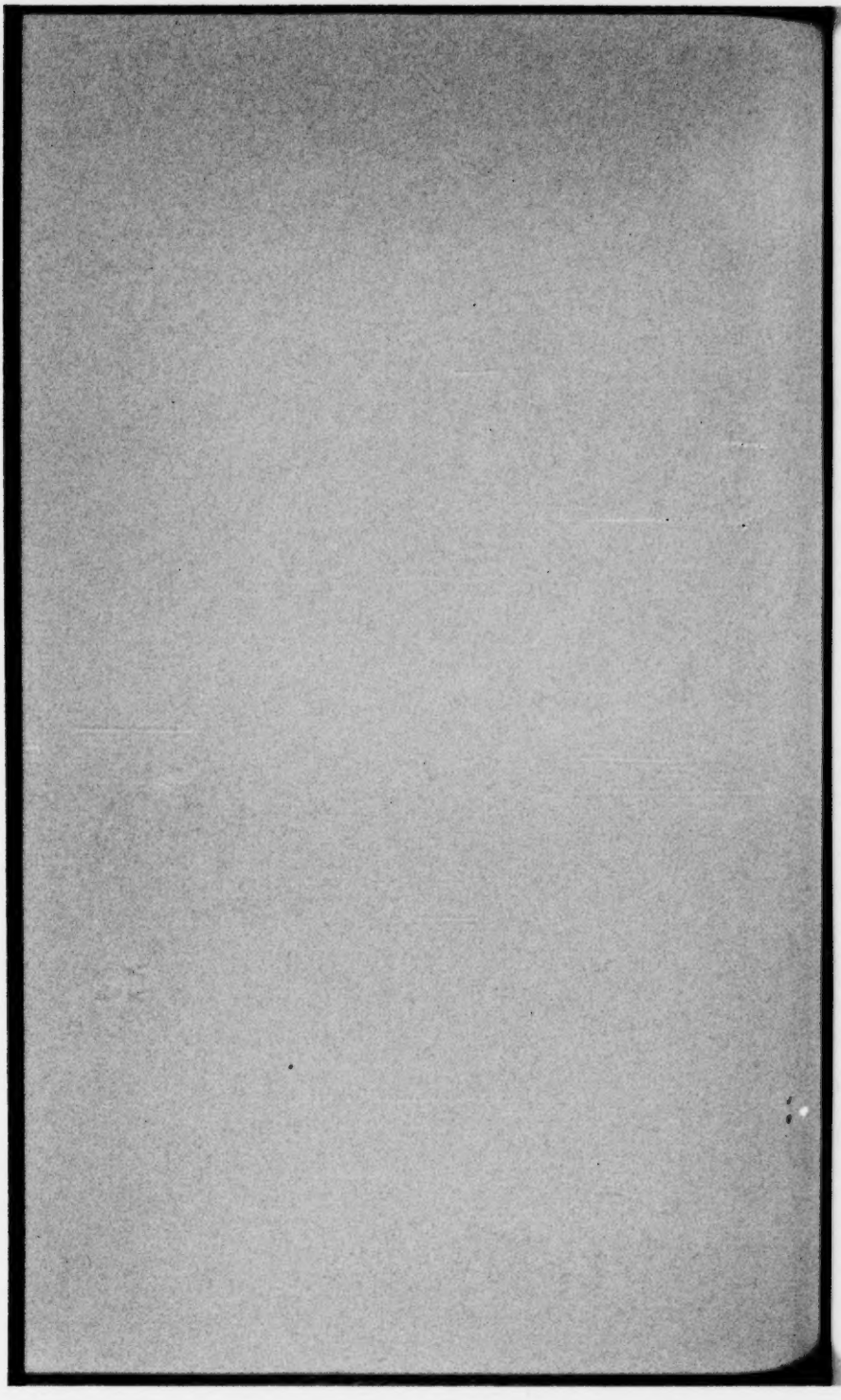

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1941.

CHARLES M. KOEBERLEIN, Petitioner, vs. GEORGE W. DURBIN and MINNIE L. DURBIN; THE CARTER OIL COMPANY; MABEL DURBIN and HARVEY H. DURBIN, Respondents.	}	No. 232.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

STATEMENT OF THE CASE.

Respondents deem it advisable to make a brief additional statement in order to present certain important and essential matters omitted from the petition for certiorari and necessary to a fair determination of the case.

As to the part of the statement of petitioner denominated "Pleadings of Respondents and Petitioner in the Litigation Here Involved" respondents say that the pleadings on their part with respect to the two deeds, that is, the one from Mabel Durbin and Harvey Durbin, and the one from these respondents, allege they were made on

the same day, as a part of the same transaction, made before the time limit of ninety days fixed by the strict foreclosure decree had expired, and were, in fact, made as a bar to said foreclosure and in compromise of the mortgage indebtedness.

Paragraph XIII of the answer of respondents (R. 56-67) and by restatement and realleging made a part of the counterclaim (R. 58) is as follows:

> "Defendants, further answering, say that at the time the said deed by them signed, executed and delivered to Charles M. Koeberlein was made, that said deed was, in fact and effect, only a mortgage to secure to the said Charles M. Koeberlein the amount so paid by him to said Mabel Durbin to prevent the decree for strict foreclosure from taking effect against these defendants; that the deed made by Mabel Durbin and her husband to Charles M. Koeberlein and the deed made by these defendants to Charles M. Koeberlein were, in fact, made on the same date and were a part of the same transaction and were made before the time limit of ninety days fixed by said decree of strict foreclosure, and were, in fact, made as a bar to said foreclosure and in settlement and compromise of the said mortgage indebtedness; that the said deed so made by these defendants as recorded is but a security for the moneys so paid by Charles M. Koeberlein for these defendants, and that they have full right to reimburse said Charles M. Koeberlein and have redeeded to them by said Charles M. Koeberlein the said described premises."

In answering these allegations (R. 64-65) petitioner admits that said two deeds were made and delivered the same day, but denies that they constituted one transaction; admits that they were made before the expiration of the ninety-day period, but denies that the deed of respondents was as security, and denies any agreement that respondents have a right to redeem.

He further avers (R. 65) that he acquired no title to the lands from respondents, but derived title to the lands under the deed from Mabel and Harvey Durbin, and that the deed from George and Minnie Durbin was made only for the purpose of waiving their right of redemption, and further denies any understanding or agreement with respondents giving them a right to redeem, or that their deed was only security for indebtedness. He further states that at no time prior or subsequent to the signing of the deed by respondents was any sum due petitioner from respondents (R. 66).

The case was tried before the Court. There was conflicting testimony on whether or not the two deeds were made and delivered the same day. The pleadings admitted that they were, but petitioner strenuously denied the allegation in his testimony. The Court found against petitioner in so far as Carter Oil Company is concerned, but found in favor of petitioner and against respondents, and dismissed their counterclaim. Appeal by petitioners as to Carter Oil Company and cross appeal by respondents.

The Opinion of the Supreme Court:

The Supreme Court of Illinois found that the pleadings alleged in legal effect the relation of mortgagor and mortgagee, and on the evidence in the record found that George W. Durbin and Minnie L. Durbin never surrendered their right to redeem.

Petitioner quotes correctly in his summary statement portions of the opinion of the Supreme Court. We believe that he omits vital and controlling portions of that opinion in so far as questions raised by the pleadings are involved. Praying the indulgence of this Honorable Court, we respectfully submit a part of the opinion wherein the Court sets forth the pleadings, the facts as found by

the Court, the legal effect of the pleadings and the value of the evidence offered by the parties as follows (R. 337-338-339):

> "The counterclaim of the Durbins requires our first consideration, because if it is sustainable there is no occasion to consider any of the other arguments or points presented. It was, in substance, alleged by them that the deed which they gave to Koeberlein was, in fact, intended as security only for money to be paid by Koeberlein to Mabel Durbin to prevent the decree of strict foreclosure from becoming final and to allow them a period of redemption; that the deed from Mabel to Koeberlein and the deed from George W. and Minnie L. Durbin to Koeberlein were, in fact, made on the same date as a part of the same transaction, within the period of ninety days limited in the decree of strict foreclosure and in settlement and compromise of the mortgage indebtedness. It was their prayer for relief that they be permitted to repay to Koeberlein the sum of money which he had advanced for them and that he be required to convey the premises to them; that it might be found that the premises had a value not exceeding $1,000 and was the homestead of the counterclaimants, and that, therefore, Koeberlein took nothing by the deed. There was also a prayer for general relief and an attached copy of a tender from them to Koeberlein of all redemption money, dated March 30, 1939."
>
> "To this counterclaim Koeberlein answered, in substance admitting that that the deed from George W. and Minnie L. Durbin was signed and delivered on the same date as the deed from Mabel Durbin. It is to be noted, in this connection, that on trial of the case he strenuously contested this date. The answered denied any promise of a right to redeem and averred that Koeberlein acquired title to the premises under a deed from Mabel Durbin and her husband, dated July 26, 1937, and that 'said deed made by said George W. Durbin and Minnie L. Durbin to this defendant was

made only for the purpose of waiving the right to redeem from said foreclosure decree; * * * that by said deed said George W. Durbin and Minnie L. Durbin did waive the right to redeem from said foreclosure decree.' His answer further avers 'That said deed was made solely for the purpose of waiving the right of the said George W. Durbin and Minnie L. Durbin and of the plaintiff herein to redeem said premises from said foreclosure decree, the title to which is already vested in this defendant by said foreclosure decree and by said deed from Mabel Durbin and Harvey H. Durbin, her husband, to this defendant.' It will be noted from the foregoing pleadings that Koeberlein squarely placed his case and the theory of the title by which he claims on (1) the quitclaim deed from Mabel and Harvey Durbin of July 26, 1937, and (2) a release by George W. and Minnie L. Durbin of their right of redemption, said to have been accomplished by their quitclaim deed of the same date and another document called 'Waiver of the right of redemption,' executed at the same time, and which will be referred to later. It is therefore necessary, first, to inquire as to the nature, character and extent of the title conveyed by the quitclaim deed from Mabel Durbin, and, second, as to the legal effect of the quitclaim deed and waiver of redemption executed on the evening of the same day by George W. and Minnie L. Durbin at their home, and not notarized.

"The answer of Koeberlein indicates a definite misconception of the legal effect of the quitclaim deed which he obtained from Mabel. At the time this deed was executed, Mabel's mortgage and mortgage indebtedness had been merged in the decree of strict foreclosure which she had obtained and that decree represented the extent of her rights against George W. Durbin and Minnie L. Durbin and her interest in the real estate in question. Under the strict terms of that decree she would have become entitled to an indefeasible estate in the land eventually, i. e., ninety days

after the decree, but no sooner—and not at all if the money due her was paid. Prior to the decree she was the owner of the legal title to the land, but it was an anomalous title, existing only as between her and George W. Durbin and only for the limited purpose of securing her indebtedness. As against every other person and for every other purpose George W. Durbin was the owner (Lightcap v. Bradly, 186 Ill. 510, and cases there cited). It necessarily follows that when Koeberlein took his quitclaim deed from Mabel Durbin he obtained nothing more than an equitable assignment of her rights in the decree of foreclosure and placed himself in her shoes—i. e., he became the mortgagee and judgment creditor subject to redemption, and his relationship to George W. and Minnie L. Durbin was identical with the relationship which had theretofore existed between Mabel and George as mortgagee and mortgagor. It is, therefore, necessary to consider the nature of this relationship, the relationship of the parties to each other, the surrounding circumstances, and the things that happened in connection with and immediately following the execution of the deed from Mabel."

Then follow a discussion and findings on the evidence and an evaluation of same by the Court and a finding that the testimony of George W. Durbin and Minnie L. Durbin that Koeberlein agreed to advance the money to Mabel and give George and Minnie time to redeem needed no great amount of corroboration. Again we quote (R. 344):

"George W. Durbin and Minnie L. Durbin each testified that Koeberlein offered to settle with Mabel, take over the indebtedness and give them two years at seven per cent interest within which to redeem and that they quitclaim to him for the purpose of carrying out that arrangement. They were corroborated by one of their children, who claims to have been home at the time and to have heard part of the conversation. In the

view which we take of the case and the evaluation which we place on Koeberlein's testimony, their testimony requires no great amount of corroboration."

The Court then, in its opinion, again refers to the theory of petitioner's case, as shown by the pleadings, and the legal effect of same, and analyzes the evidence bearing on the issues raised by the contention of petitioner in his pleadings (R. 344):

> "We have pointed out above that by his deed from Mabel Durbin, Koeberlein took no legal title, but merely an equitable assignment of her rights as mortgagee and foreclosure creditor. We also noticed that Koeberlein's theory of the case is disclosed by his answer that he had taken the quitclaim deed from the Durbins merely for the purpose of extinguishing their right of redemption. This answer clearly places him, on his own theory of the case, in the position of a mortgagee dealing with his mortgagor for a conveyance of the mortgagor's equity. This relationship is one about which the law is very strict, not only in Illinois, but everywhere. While it is not legally impossible for a mortgagee to acquire the mortgagor's equity of redemption, yet such a transfer or agreement to transfer is one that is jealously regarded by a court of equity and which will be strictly scrutinized for evidence of oppression, fraud or unfairness. It is the spirit and intent of our law and it is our public policy, as declared by the statutes of this state, that mortgagors shall have a reasonable time within which to redeem, and such laws have always been liberally construed. Reflection makes it apparent that our public policy as to redemption could not be maintained under any other rule."

We agree with the statement of petitioner that the questions touching the lease of The Carter Oil Company are not here involved. The Supreme Court of Illinois affirmed the

decree of the lower court, finding in favor of The Carter Oil Company. That finding was not questioned on petition for rehearing, and a stipulation was entered into between The Carter Oil Company and petitioner, in which petitioner recognizes the validity of said lease, which said stipulation has been filed in the Circuit Court.

SUMMARY OF ARGUMENT.

No Grounds Exist Which Would Justify the Exercise by This Court of Its Power to Grant a Writ of Certiorari.

I.

The power of this Court in granting certiorari to review the decision of the Supreme Court of the state is limited by Section 237 of the Judicial Code (28 U. S. C. A. 344). The petition fails to show that any title, right, privilege or immunity was specially set up or claimed by either petitioner or respondents under the Constitution of the United States. Therefore no question is presented by this record which gives this Court jurisdiction to grant certiorari.

II.

The Supreme Court of Illinois properly decided the case under the pleadings presented, and had a right to make the findings and reach the conclusion on the record presented.

ARGUMENT.

No Grounds Exist Which Would Justify the Exercise by This Court of Its Power to Grant a Writ of Certiorari.

I.

This Court has no power or jurisdiction to grant a writ of certiorari for the purpose of reviewing the decision of the Supreme Court of the state unless the record shows that the case comes under Section 237 of the Judicial Code (Title 28, Par. 344). Here it is claimed by petitioner that a question concerning the Constitution of the United States is involved and that his rights under the Fourteenth Amendment to the Federal Constitution have been violated. In other words, it is claimed that in this case the title, right, privilege and immunity of petitioner was specially set up and claimed under the Constitution of the United States. An examination of the record here shows that such is not the fact; that petitioner never did set up any rights under the Federal Constitution; that petitioner did not raise any question of a violation of his rights under the Fourteenth Amendment, even in his petition for rehearing, but based his right to a rehearing on the ground that the Supreme Court found from the evidence that the petitioner had been unfair in his dealings, and that his evidence against that of George W. Durbin and Minnie L. Durbin had little weight; that the Court had no right to find from the evidence that petitioner was guilty of fraud, overreaching, or unfair dealing, because there was no such allegation in the pleadings, and that if such allegations had been made petitioner could and would have produced evidence which might have given the Court a better opinion of him and his testimony. We submit that no question of the Federal Constitution ever was or is presented in this record, and that no title, right, privilege or immunity was specially set up or

claimed by either party under the Federal Constitution, and that there are no grounds whatever for this Court assuming jurisdiction herein. On the contrary, under the statute this Court does not have jurisdiction.

II.

The decision of the Supreme Court of Illinois was proper under the pleadings. Petitioner, by his pleadings, acknowledged himself to be in a fiduciary relationship to the respondents. The Supreme Court found that this was the true construction of his pleadings, and found that petitioner had failed to discharge his obligation as such fiduciary. When it was determined that he occupied a fiduciary relationship, his fraudulent conduct was at issue. It is not necessary that the legal result of such relationship be pleaded. There was no denial of due process or any interference with a federal right in this case, because the matters decided were distinctly in issue. The decision of the Supreme Court was right, but even if wrongfully decided, this Court will not take jurisdiction to determine whether the Supreme Court of Illinois correctly applied the decisions that had been heretofore made by that Court.

We submit that a party is bound by his pleadings and his evidence even though he may have in mind a legal effect different from the construction the reviewing Court places upon the pleadings.

We think the cases cited by petitioner are not authority in this case for the reason that the facts are not at all similar.

In Hormel v. Helvering, 61 S. Ct. Rep. 719 (pp. 15-16 Petition), the Court say:

> "Because of conflicts among the Circuit Courts of Appeals on the propriety of considering Sec. 22 (a), under these circumstances we granted certiorari."

And in Helvering v. Tex-Penn Co., 300 U. S. 481 (pages 16-17 of Petition), which was a tax case, the Supreme Court declined to consider the contention of the Commissioner because he never made the contention at any time before hearing in Supreme Court, not even in his petition for certiorari.

The case of Helis v. Ward, 308 U. S. 365 (page 24 of Petition), is, in our opinion, authority that a court of review may place a different interpretation on written pleadings than did the trial court. In that case the District Court made a finding on a contract. The Circuit Court of Appeals placed a different construction on the pleaded instrument, reversed the decision and directed entry of judgment for plaintiff. Held on certiorari that failure of Circuit Court of Appeals to remand case for new trial did not deprive defendant of his day in court or violate his constitutional rights. And the Court say:

> "The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not, per se, sufficient to cause a remand for a new trial under the rule in Saunders v. Shaw, 244 U. S. 317."
>
> "To be sure, Petitioner now asserts that on a new trial he would attack the competency and accuracy of the Umpire's report."

In the case of Saunders v. Shaw, 244 U. S. 318 (Petition, pp. 24-25), the defendant was denied the right to offer any evidence for the reason that when defendant made offer of his testimony it was ruled inadmissible and the defendant had no evidence, and under such circumstances he had not had "his day in court."

Petitioner cites and quotes Union Cem. Association v. Kansas City, 252 Mo. 466 (Petition, p. 26). The quoted part of the opinion, on page 26 of the petition, is in answer to a "request" which in the printed opinion is as follows:

> "Judge L. C. Slavens appeared in this Court (the Supreme Court) as counsel for certain lot owners in the capacity of intervenors, I suppose, but who were not represented in the Court below, and asked that this Court find and decree that the cemetery owes certain duties to preserve and beautify the cemetery and the graves thereof, and that this Court require the officers thereof to provide and set apart a fund sufficient and out of which said cemetery may be preserved, cared for and with which to beautify the graves therein."

We submit that the facts in the last above cases are so different from the facts in the case between petitioner and respondents that it does not rise to the dignity of authority herein.

In the case of Castle v. Persons, 117 Fed. 835 (page 26 of Petition), petitioner quotes the words of Judge Sanborn, which only stated a general rule. The case was not reversed on any ground of lack of due process. The trial court had evidence before a jury and directed a verdict.

Judge Carland, of the reviewing Court, rendered the opinion and reversed the case because he said there was evidence which required submission to a jury. Judge Thayer dissented and said the trial judge was right. Judge Sanborn concurred and in his concurring opinion used the quoted language in the petition herein (p. 26).

This is a suit in equity and the oft-quoted maxims and rules of equity were invoked and enforced by the reviewing Court. The Court found and decreed from the evidence that petitioner did not do equity and that he should return what he took with unclean hands.

Paragraph II of petition, page 18, states:

> "The Supreme Court of Illinois based its decision entirely upon a proposition of fact and a theory not presented in the pleadings of any of the parties, or

raised or litigated at the trial, or presented or argued in the briefs of the parties filed in the Supreme Court."

The petitioner then says that by their pleadings respondents contended that an agreement was made between respondents and petitioner that respondents were to have two years to repay petitioner the amount petitioner had paid to Mabel Durbin under the foreclosure decree, and upon such payment respondents were to receive a conveyance of the property from petitioner. That the conveyance from respondents to petitioner was intended to be a mortgage. That petitioner joined issue. On this issue the Supreme Court found as follows (R. 344):

> "George W. Durbin and Minnie L. Durbin each testified that Koeberlein offered to settle with Mabel, take over the indebtedness and give them two years, at seven per cent interest, in which to redeem and that they quitclaimed to them for the purpose of carrying out that arrangement. They were corroborated by one of their children, who claims to have been home at the time and to have heard part of the conversation. In the view we take of the case and the evaluation we place on Koeberlein's testimony their testimony requires no great amount of corroboration."

This language is certainly a finding on a litigated issue and a direct finding that George W. Durbin and Minnie L. Durbin had proved their contention, that is, that the deed they made to Koeberlein was only a mortgage with the right to redeem in two years, and thus the relation of mortgagors and mortgagees existed.

But the Supreme Court of Illinois said that under the pleadings of petitioner, by his deed from Mabel Durbin, he took no legal title as petitioner claimed he did, but even under that deed had only an equitable title and became during the period of redemption only a mortgagee in the stead of Mabel Durbin (R. 344). The reviewing Court

certainly had the right to interpret the pleadings, even if their interpretation differed from that of petitioner. Petitioner said by his pleading that he took a deed from Mabel Durbin and husband that vested in him a fee-simple title to the land. The Supreme Court said that the deed only gave petitioner an equitable assignment of the rights of Mabel Durbin as mortgagee and foreclosure creditor, and then follow with their finding from the evidence the lack of veracity, frankness, and fair dealing. The Court found from the evidence that petitioner tricked and defrauded respondents. That his testimony showed lack of frankness and honesty and other frailties. He now says if he had known the Supreme Court was going to say all those things about him, if he had been warned by pleadings or allegations that he was suspected, he could have painted a different and more pleasant picture. However, he submitted his own pleadings, did his testifying, produced many witnesses to sustain his position, and if the Court found from evidence that his conduct was not fair, honest, and equitable and so decreed, we fail to see where any provision of the Constitution has been violated.

The case, Windett v. Ruggles et al., 151 Ill., page 184, at 190, was a consolidated case. It was claimed that the reviewing Court erred in adjusting equities in a bill as amended without there being any answer to the bill or otherwise put at issue, and therefore it could not have been adjudicated upon. The Court, in its opinion, page 190, say:

> "This Court had jurisdiction of the appeal from the final decree in the consolidated case. On reversal of the decree, it had power itself to enter such decree as in its opinion, upon the whole case, was consonant with justice and equity, or it might, in its discretion, remand the case to the Court below with directions as to the decree to be entered. And in determining the nature and provisions of the appropriate decree, it was not

> limited to the precise question upon which the Court below had rendered its decision, but was at liberty to consider and adjust all the equities of the case, so far as presented by the pleadings and the proof. If, inadvertently or otherwise, it passed upon the equities of a bill to which no answer had been filed, such action was at most a mere irregularity which in no way impaired the binding and conclusive effect of the final judgment of the Court."

And Helis v. Ward, 308 U. S. 365, enunciates the same doctrine in these words:

> "The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not, per se, sufficient to cause a remand for a new trial under the rule of Saunders v. Shas, 244 U. S. 317."

Petitioner states two reasons why writ in this case should be granted (p. 10 of Petition):

1. That respondents alleged the existence of an agreement between them and petitioner, under which respondents had the right to redeem. That petitioner met this issue successfully in the trial court. That the reviewing Court, in reversing the decree, wholly ignored this issue.

We submit that it requires only a glance at the Court's opinion to be convinced that the above issue was considered by the reviewing Court, the evidence considered and evaluated and a finding that upon that question the Durbins needed little corroboration (R. 344).

2. The second reason urged by petitioner in support of his petition is that the opinion of the Supreme Court of Illinois brands petitioner as a crook and perjurer and as devoid of morals and ethics. That his reputation as merchant and banker is impugned. And further says that his conduct in connection with the transaction involved was not even questioned by respondents.

We respectfully submit that his conduct, his purposes and his statements were questioned by respondents and made a sharp issue by the testimony.

The Supreme Court of Illinois passed upon the evidence. That Court was not impressed with the testimony of petitioner, or his veracity, fairness or honesty, as shown by the evidence. Certainly it will not be contended that the court of review did not have the right to disbelieve petitioner or ascribe to him improper conduct, motives, statements, if, in the Court's opinion, the evidence so showed. We insist that the opinion points out the obliquities, frailties, trickery, as shown by the evidence whereby the court of review places its estimate on petitioner, his purposes and intents, and the value of his testimony.

It is, therefore, respectfully submitted that the petition presents no grounds which would justify the exercise by this Court of its power to grant a writ of certiorari to the Supreme Court of Illinois, as the record shows, first, that no federal question was or is presented by this record; and, second, that the decision of the Supreme Court of Illinois was correct.

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